TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2, 3
Statement of the Case	4
Reason for Granting the Writ	
The Pennsylvania Supreme Court has, on an incorrect interpretation of this Court's holding in *Furman v. Georgia*, — U.S. —, 92 S.Ct. 2726 (1972), vacated the death sentence imposed on respondent and imposed a sentence of life imprisonment, without giving the Commonwealth the opportunity to argue and prove that the death penalty in Pennsylvania has not been imposed in violation of the standards discussed in *Furman v. Georgia*	7
Conclusion	17
Appendix	
A. Death Penalty Survey—1960 to present	18
B. Opinion and order of the Supreme Court of Pennsylvania entered October 4, 1972	19
C. Order of the Supreme Court of Pennsylvania entered November 14, 1972	21

TABLE OF CITATIONS

Federal Cases:	Page
Boddie v. Connecticut, 401 U.S. 371 (1971)	17
Coyle v. Pennsylvania, 392 U.S. 647 (1968)	9
Furman v. Georgia, — U.S. —, 92 S.Ct. 2726 (1972), *et seq.*	2
Phelan v. Brierley, — U.S. —, 92 S.Ct. 2875 (1972)	9
Scoleri v. Pennsylvania, — U.S. —, 92 S.Ct. 2852 (1972)	9
Pennsylvania Cases:	
Commonwealth v. Bell, 417 Pa. 291 (1965)	10
Commonwealth v. Green, 396 Pa. 129 (1965)	10, 12
Other States:	
Bartholomey v. State, — Md. —, 12 Cr.L. 2313 (December 4, 1972)	16
State v. Dickerson, — Del. —, 12 Cr.L. 2145 (November 1, 1972)	16
State v. Waddell, — N.C. —, 12 Cr.L. 2361 (January 18, 1973)	16
State v. Winkle, Utah Superior Ct., as reported in *The Evening Bulletin*, Phila., Pa., p. 41 (January 24, 1973)	16
Statutory and Constitutional Provisions:	
Federal:	
Amendment VIII, United States Constitution.	2
Pennsylvania:	
Act of June 24, 1939, P. L. 872, §701, as amended by Act of December 1, 1959, P.L. 1621, §1, 18 Pa. Stat. Ann. §4701	2

IN THE

Supreme Court of the United States

1972

No.

COMMONWEALTH OF PENNSYLVANIA, *Petitioner*

v.

JACK LOPINSON, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Commonwealth of Pennsylvania, through the District Attorney of Philadelphia, respectfully requests that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania entered in the above-captioned case on November 14, 1972.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania vacating the death penalty and imposing a sentence of life imprisonment is reported at 449 Pa. 33 (1972) and is set out in Appendix B attached hereto. The order of the Supreme Court of Pennsylvania denying reargument in this matter is unreported and is printed as Appendix C attached hereto.

JURISDICTION

The order of the Pennsylvania Supreme Court denying reargument issued on November 14, 1972. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Is not the Commonwealth of Pennsylvania entitled to an opportunity to argue and prove by factual and legal analysis that the death penalty in Pennsylvania is not applied in violation of the standards discussed by this Court in *Furman v. Georgia*, — U.S. —, 92 S.Ct. 2726 (1972), but is instead applied to a narrowly circumscribed group of the most heinous crimes, without arbitrariness or discrimination, and under increasingly careful guidelines from the Supreme Court of Pennsylvania?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, in pertinent part, that "cruel and unusual punishments" shall not be inflicted.

The Pennsylvania Murder Statute, Act of June 24, 1939, P. L. 872, §701, as amended by Act of December 1, 1959, P.L. 1621, §1, 18 Pa. Stat. Ann. §4701, provides, in pertinent part, that:

> All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. . . .

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty. In the trial of an indictment for murder, the court shall inform the jury that if they find the defendant guilty of murder in the first degree, it will be their further duty to fix the penalty therefor, after hearing such additional evidence as may be submitted upon that question. . . . . After a verdict is recorded and before the jury is permitted to separate, the court shall proceed to receive such additional evidence not previously received in the trial as may be relevant and admissible upon the question of the penalty to be imposed upon the defendant, and shall permit such argument by counsel, and deliver such charge thereon as may be just and proper in the circumstances. The jury shall then retire and consider the penalty to be imposed and render such verdict respecting it as they shall agree upon.

STATEMENT OF THE CASE

A. *Procedural History*

On March 4, 1965, Jack Lopinson was convicted of first degree murder. The jury fixed the penalty at death, and sentence was thereafter imposed by the Trial Judge in accordance with the jury's verdict. The conviction and sentence were affirmed by the Supreme Court of Pennsylvania. *Commonwealth v. Lopinson*, 427 Pa. 284 (1967). The United States Supreme Court granted Lopinson's petition for a writ of certiorari (392 U.S. 647), vacated the judgment of sentence and remanded to the Supreme Court of Pennsylvania for reconsideration of the case in light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Supreme Court of Pennsylvania, in turn, remanded the case to the court below for a determination of the *Witherspoon* issue. The court below found no violation of the standards enunciated in *Witherspoon* and filed a Report to the Supreme Court of Pennsylvania to that effect. Lopinson filed exceptions to the Report. While the matter was still pending before the Pennsylvania Supreme Court, this Court rendered its decision in *Furman v. Georgia*, — U.S. —, 92 S.Ct. 2726 (1971). Based on that decision, and without having argument presented to it on the constitutionality of the death penalty as imposed in Pennsylvania, the Supreme Court of Pennsylvania vacated the death penalty imposed on Lopinson, and sentenced him to life imprisonment. The Commonwealth sought reargument in the Supreme Court, but this was denied.

The Commonwealth now petitions this Court for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court vacating the death sentence.

B. *Factual History*

Early in the morning of June 19, 1964, about 3:30 a.m. Judith Lopinson, petitioner's wife, and Joseph Malito were

shot to death in the basement office of a restaurant, known as Dante's Restaurant, located in Philadelphia's centre-city. At that time the restaurant was operated by Lopinson and Malito under a partnership agreement. The basic facts as to the murders are as follows:

Lopinson requested Phelan to kill both his wife and Malito for an agreed cash sum. Phelan agreed to perform the services. Shortly before the killings Lopinson drove Phelan in his automobile to the state of Delaware to secure the murder guns for which Lopinson paid the purchase price. The time and place for the commission of the killings were suggested by Lopinson; originally the crimes were planned for two nights earlier but at the last minute were deferred.

A few hours before the killings Phelan and Lopinson discussed and reviewed the final plans in Phelan's automobile. At Lopinson's suggestion Phelan entered the basement of the restaurant through a rear cellar door and hid himself. He waited there for the restaurant to close and for Judith Lopinson and Malito to come from the first floor of the restaurant to the basement office to count the day's receipts. Upon their arrival Phelan entered the office with a gun in each hand and shot each victim in the head twice. Phelan went upstairs and reported the shootings to Lopinson; they returned together to the basement office, and upon discovering that neither Judith Lopinson nor Malito was dead, Phelan at the request and in the presence of Lopinson, fired two additional bullets into the heads of both victims.

The two then returned upstairs and discussed the explanation previously agreed upon that Lopinson would give the police, viz., that the restaurant had been help up by two unknown men who had fatally shot Judith Lopinson and Malito and also shot Lopinson. To bolster this concoction, Phelan shot Lopinson through the fleshy part of his thigh. After Phelan left the premises Lopinson fired a bullet from his own gun into a wall of the restaurant. When the police arrived, Lopinson told them the fabricated story about the restaurant robbery. (At his trial Lopinson ad-

mitted that the story he gave to the police was a lie. Since Phelan had already testified as to the shootings as above related, Lopinson abandoned his prepared version and gave another equally incredible explanation.)

From the evidence, the jury could have logically found that the purpose of the shooting was that Lopinson wanted to get rid of his wife for another woman, his mistress, and the killing of Malito would aid in solving Lopinson's substantial financial difficulties and render the false robbery story by two unknown intruders more plausible.

When Phelan left the premises, he drove to a pier on the Delaware River and threw the guns he used into the river. After his confession, Phelan directed the police to the area and the two guns were recovered. Ballistic tests established these guns as the murder weapons.

As previously indicated, Lopinson's trial was extensive; many witnesses were heard whose testimony supported and corroborated numerous aspects of Phelan's testimony.

ARGUMENT

The Commonwealth of Pennsylvania is entitled to the opportunity to argue and prove that the death penalty in Pennsylvania is not applied in violation of the standards discussed by this Court in *Furnan v. Georgia*, but is instead applied to a narrowly circumscribed group of the most heinous crimes, without arbitrariness or discrimination, and under guidelines from the State Supreme Court.

The order of the Pennsylvania Supreme Court vacating the death penalty imposed on Lopinson and denying the Commonwealth the opportunity to present argument as to whether imposition of the death penalty in Pennsylvania has been exercised on an arbitrary, capricious, or discriminatory basis, was based on this Court's decision in *Furman v. Georgia*, — U.S. —, 92 S.Ct. 2726 (1972).

The per curiam order of the Court in *Furman v. Georgia* provides in pertinent part that:

> The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Marshall each filed a separate opinion in support of the judgments. Since the judgments of the Court required the concurrence of each of these Justices, the holding of the Court can have no broader application than those points which command the acceptance of all of the Justices.

Only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, reached the question of whether capital punishment was cruel and unusual *per se* and con-

cluded that it was. Mr. Justice Douglas, Mr. Justice Stewart and Mr. Justice White, on the other hand, did not reach the question of the *per se* constitutionality of capital punishment but concurred in the judgments of the Court, concluding that the specific death sentences before them were cruel and unusual punishment. In general, the conclusions of the foregoing three justices, whose concurrence was essential to the judgment of the case, were based on the discriminatory and/or arbitrary application of a non-mandatory death penalty as evidenced by its application in the cases before the Court, which cases arose in States other than Pennsylvania.

Specifically, Mr. Justice Stewart concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." — U.S. at —, 92 S.Ct. at 2763. He based this conclusion upon a belief that capital punishment had not been imposed on many persons convicted of crimes as reprehensible as the petitioners' acts and that the petitioners were "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." — U.S. at —, 92 S.Ct. at 2762. While it may be true that capital punishment has not been imposed on many persons convicted of crimes as reprehensible as the acts of the petitioners in *Furman* and its companion cases, in Pennsylvania no one who had committed a crime which was merely as reprehensible as the acts of those petitioners would be punished with the death penalty. Of course, in the companion cases of *Jackson v. Georgia* and *Branch v. Texas* where the crime charged was rape, death would not be a possible penalty under Pennsylvania law, since only first degree murder is punishable by death under Pennsylvania law. 18 P.S. §4701, *supra*. However, while the penalty of death was under the statutory language a possible penalty for the felony-murder committed by Furman, the Pennsylvania practice for at least the last decade has consistently been to impose a sentence of imprisonment for life where

during the course of a felony death resulted, but no violent acts were intentionally committed on the victim and where the victim's death was caused accidentally during the course of the felony. (See opinion of Mr. Justice Douglas, noting that Furman claimed that his gun went off accidentally when he fell during his escape from the burglarized premises, and that the Georgia Supreme Court accepted his version of the shooting as an accidental one during the course of the robbery. — U.S. —, 92 S.Ct. at 2754-55, fn. 48.) That is, if the factual situations presented to this Court in *Furman* and its companion cases had arisen in the state courts of Pennsylvania, in none of those instances would Pennsylvania practice have allowed imposition of the death penalty.

Indeed, the Philadelphia case now before this Court is an excellent example of the careful and appropriate way in which the death penalty has been applied in Pennsylvania, as were the only three other death cases to reach the Supreme Court from Philadelphia since the moratorium against capital punishment began in 1967. See *Coyle v. Pennsylvania*, 392 U.S. 647 (1968), vacating and remanding 427 Pa. 72 (1967), and 415 Pa. 379 (1964); *Scoleri v. Pennsylvania*, — U.S. —, 92 S.Ct. 2852 (1972), vacating death penalty in and remanding *Commonwealth v. Scoleri*, 432 Pa. 571 (1968); and *Phelan v. Brierley*, — U.S. —, 92 S.Ct. 2875 (1972), vacating death penalty in and remanding *United States ex rel. Phelan v. Brierley*, 453 F.2d 73 (3d Cir. 1972). Moreover, the Commonwealth of Pennsylvania is prepared to show that not only these cases, but the other Pennsylvania cases in which capital punishment has been imposed would not be cruel and unusual punishment within the language of the opinions of several of the concurring Justices in *Furman v. Georgia*.

The three Pennsylvania cases above and the instant case, like the other Pennsylvania death cases, are clearly reprehensible to a degree that is almost unique even among first degree murder cases. Thus, Jack Lopinson, respondent

herein, was a restaurant owner who hired Frank Phelan to assassinate Mrs. Lopinson and his business partner in a staged robbery, and Phelan carried out the killing with a degree of viciousness which must have satisfied Lopinson's deepest hates. Anthony Scoleri climaxed a career marked by 25 convictions for robbery by robbing and murdering a shopkeeper, committing a further series of armed robberies and pistol whipping during his post-murder flight. The predictability of the death penalty in Pennsylvania can be seen from this case in which two juries and a panel of judges imposed the death penalty in three successive trials. Finally, John Coyle went into hiding in Philadelphia following robberies in New England, gunned down a Philadelphia police officer in cold blood when he caught Coyle stealing milk, and then left Philadelphia on a rampage of crime which ended in two further shootouts with the police in Massachusetts. The decision of judges or juries to impose the death penalty in such cases as these cannot be labelled capricious.

Mr. Justice Stewart specifically stated that the Court, in deciding *Furman* and its companion cases, was not faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. The *Furman* decision, according to his opinion, left open the question of whether a state legislature could constitutionally determine that certain criminal conduct is so atrocious as to warrant the penalty of death. — U.S. at —, 92 S.Ct. at 2761. In Pennsylvania, the determination that certain conduct warrants the death penalty has been a joint determination made by the legislature and the courts, the legislature limiting the death penalty to first degree murder cases, and the courts providing increasingly careful guidelines for the determination of the appropriate penalty, *e.g.*, *Commonwealth v. Bell*, 417 Pa. (1965), and limiting the death penalty to only heinous crimes where consideration of the criminal histories and psychiatric conditions of the defendants show no mitigating factors. *Commonwealth v. Green*, 396 Pa. 129 (1965).

Mr. Justice White concluded that a non-mandatory death penalty is so rarely applied that it cannot be said to carry out any legislative policy. — U.S. at —, 92 S.Ct. at 2763-64. However, the Pennsylvania cases discussed above are, as noted above, good illustrations of the fact that within the small class of the most heinous first degree murders the death penalty is applied with considerable regularity except when there are clear mitigating factors which would make it inappropriate to sentence a given defendant to death despite the atrocious nature of his criminal acts. Mr. Justice White's opinion was based on his conclusion that there is no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. — U.S. —, 92 S.Ct. at 2764. It is precisely for the purpose of demonstrating that there is such a reasonable basis for making this distinction among Pennsylvania cases, that the Commonwealth believes that it is entitled to the opportunity to present argument and factual and legal analysis.

Finally, Mr. Justice Douglas concluded that a non-mandatory death penalty is unconstitutional because he believed that death sentences were most often imposed on minorities or the poor. Yet, once again, the death cases from Philadelphia which have been before the Supreme Court make it clear that this is not the case in Pennsylvania. Neither Lopinson nor Phelan nor Scoleri nor Coyle was black or a member of any other minority group. Lopinson was a wealthy restaurant owner (*Cf.* Mr. Justice Douglas' statement that: "One searches our chronicles in vain for the execution of any member of the affluent strata of this society," — U.S. —, 92 S.Ct. at 2733) and nothing in the record available to the Commonwealth indicates that either Phelan, Scoleri or Coyle was less than a member of the middle classes. Indeed, each was represented by private counsel including a number of leading members of the bar at some time in the proceedings and Lopinson and Coyle have always been so represented. On the other hand, the Supreme Court of Pennsylvania has held that, as a matter

of law, youth, mental deficiency, *negritude* and the disabilities of a ghetto childhood require the reversal of a death penalty imposed upon even the perpetrator of an atrocious crime. *See, e.g., Commonwealth v. Green*, 396 Pa. 129, *supra*. Thus, at least for more than a decade, the danger of discriminatory application of the death penalty which provided the major basis for the opinion of Mr. Justice Douglas and concerned Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall has not existed in Pennsylvania. Mr. Justice Douglas' opinion states that "a law which in the overall view reaches that result [economic and racial discrimination] has no more sanctity than a law which in terms provides the same. Thus, these discretionary statutes are unconstitutional in their operation." — U.S. —, 92 S.Ct. at 2735. If a law is proved not to reach such a result, but is instead proved to be non-discriminatory in its application as well as on its face, it would not fall under this opinion.

If this Court should decree that the order below denying reargument be vacated, the Commonwealth is prepared to argue and prove on the basis of legal and statistical analysis that, contrary to the concerns of Mr. Justice Stewart and Mr. Justice White in their opinions in *Furman*, the death penalty in Pennsylvania has not been applied rarely or capriciously; rather death sentences were imposed on 7.91% of all defendants convicted of first degree murder in this state since 1960. Those death penalties were imposed upon defendants in cases constituting the most heinous crimes committed in the Commonwealth in that period. Death penalties have been imposed in those cases whenever such cases arose (some of the most recent death penalties in Pennsylvania have been imposed in the cases of Donald Bryant, one of four defendants who robbed a sixty year old businessman, then beat him with a sledge hammer and finally attempted to decapitate him with a hacksaw; and the cases of Paul Gilly and Aubran Martin, convicted in the murder for hire slayings of Joseph A. Yablonski, his wife, and his daughter). Further, as to Mr. Justice Douglas' concern that the death penalty is more im-

posed upon members of minority groups or the poor, the Commonwealth's statistics demonstrate to the contrary.

A study of the *actual practice* in Pennsylvania over the period of 1960 to the present, as applied to the factors discussed by the United States Supreme Court Justices in *Furman v. Georgia*, reveals the following:

a. Since 1960, 430 defendants have been convicted of first degree murder in Pennsylvania. Of that number 34 (or 7.91%) have received the death penalty. Of the 430 defendants, 253 (or 58.60%) were black, and 162 (or 37.60%) were white. Of the 34 death penalties handed down in these cases, 19 (or 55.88% of death penalties) were as to black defendants and 14 (or 41.17% of death penalties) were as to white defendants. Of the 253 black defendants convicted of first degree murder, 19 (or 7.47%) of black defendants) were sentenced to death, while of the 162 white defendants convicted of first degree murder, 14 (or 8.63% of white defendants) were sentenced to death.

Thus, it can be seen that on the basis of race alone, no discrimination exists in the imposition of the death penalty in Pennsylvania.

b. Of the 430 defendants convicted of first degree murder, 310 (or 72.09% of all defendants) were represented by Court appointed counsel, and 120 (or 27.91% of all defendants) were able to retain private counsel. Of the 310 defendants represented by Court appointed counsel, 26 (or 8.38% of these defendants) received the death penalty. Of the 120 defendants who were able to retain private counsel, 8 (or 6.66% of these defendants) were sentenced to death.

Thus, it can be seen that while defendants represented by Court appointed counsel constitute a great majority of the defendants convicted, only 1.72% more of those defendants received the death penalty as opposed to defendants represented by privately retained counsel. It is therefore apparent that on the basis of poverty alone, there is no discrimination in the imposition of the death penalty in Pennsylvania.

c. Of the 430 defendants convicted of first degree murder, 305 (or 71.43% of all defendants) demanded jury trials, and 122 (or 28.57% of all defendants) pled guilty (the nature of disposition in three cases was unavailable, therefore the model is 427 cases). Of the 305 defendants who demanded jury trials, 24 (or 7.86% of those defendants) were sentenced to death; of the 122 defendants who pled guilty, 10 (or 8.19% of those defendants) received the death penalty.

Once again, it can be seen that while a considerably higher percentage of defendants demand trial by jury, a slightly lower percentage of those defendants received the death penalty as compared to those defendants who pled guilty. Thus, it is indicated that on the basis of nature of disposition alone, no discrimination existed in the imposition of the death penalty in Pennsylvania.

d. Of the 253 black defendants convicted of first degree murder, 79 (or 31.23% of black defendants) were able to afford private counsel, while of the 162 white defendants convicted of first degree murder, 40 (or 24.69% of white defendants) were able to afford private counsel. It appears therefore that there is no correlation, in this context, between race and poverty as reflected in a defendant's ability to retain private counsel.

e. By combining the three factors discussed above at a, b and c, the lack of discrimination in Pennsylvania becomes more evident. Of the 430 total defendants, 128 (29.75% of all defendants) were black, had Court appointed counsel, and demanded trial by jury. Yet, only 8 (or 6.25% of these defendants) received the death penalty. By comparing this statistic to the fact that 7.91% of all defendants received the death penalty, it is obvious that no discrimination exists on the basis of the combination of these three factors.

It is apparent that, in Pennsylvania, the death penalty has been imposed on the basis of two dominant factors, and not on the basis of race, poverty or type of adjudication.

Those factors are, in order of importance, the nature of the crime involved, and the defendant's prior criminal history. Both of these factors are such that the defendant, and only the defendant, has control of them. Of the 34 death penalties meted out in Pennsylvania since 1960, virtually all of them have been in cases which involved especially atrocious murders (*Cf.* the instant case, the Scoleri, Phelan and Coyle cases noted above, and the cases of John Burgess, Elmo Smith, Paul Gilly, Aubran Martin, Carl Melton, etc.).

The Commonwealth is in the process, at this time, of gathering further facts concerning the intelligence level, educational background, psychiatric history and psychological history of each of the aforementioned 430 defendants, and will be prepared to present this additional information upon the occasion of an evidentiary hearing in the instant case should this Court so permit.

The Commonwealth respectfully urges that, upon proof of these statistics, the majority of the Justices of the United States Supreme Court would uphold the death penalty as applied in Pennsylvania.

A compilation of the Commonwealth's now completed analysis of the imposition of the death penalty in Pennsylvania since 1960, in terms of the criteria discussed by Mr. Justice Stewart, Mr. Justice White, and Mr. Justice Douglas in *Furman*, is attached hereto as Appendix A. The Commonwealth respectfully requests that this Court consider whether these statistics are not necessary to a full consideration of the application of *Furman* in Pennsylvania.

In deciding *Furman v. Georgia* and its companion cases, this Court had the benefit of briefs on behalf of counsel for the State of Georgia, the State of Texas and numerous *amici curiae*. But no brief on behalf of the Commonwealth of Pennsylvania relating to the constitutionality of the death penalty as applied in its jurisdiction was filed in that case, nor was the Commonwealth given the opportunity to present argument in the instant case in its state courts.

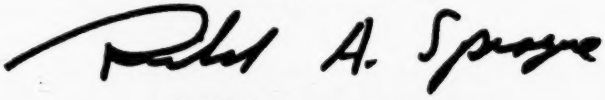
Since the holding of the Supreme Court in *Furman v. Georgia* is not that the imposition of the death penalty is cruel and unusual under all circumstances but merely that it was cruel and unusual under the circumstances of the cases before the Court, *Cf. Bartholomey v. State*, — Md. —, 12 Cr. L. 2313 (December 4, 1972) (dissenting opinion), it is clearly material that the Commonwealth of Pennsylvania be given the opportunity to establish that capital punishment as applied to Pennsylvania cases is not cruel and unusual within this Court's interpretation of the Eighth Amendment. The Pennsylvania Supreme Court should have granted the Commonwealth the opportunity to present legal argument and statistical analysis, so that a basis could have been established for consideration of the issue. There are, as other courts have recognized, a number of unresolved problems in the application of *Furman* to the States, which situation requires something more than the automatic vacation of death penalties. States must consider, for example, whether the *Furman* decision requires reversion to death penalty statutes which are mandatory in all cases. The Supreme Courts of Delaware and North Carolina, and a trial court in Utah, have held that the *Furman* decision does not render capital punishment impermissible under all circumstances, but renders it impermissible only when it is imposed in accordance with a statute making imposition discretionary with the jury. *State v. Waddell*, — N.C. —, 12 Cr. L. 2361 (January 18, 1973); *State v. Dickerson*, — Del. —, 12 Cr. L. 2145 (November 1, 1972); *State v. Winkle*, Utah Superior Court, as reported in The Evening Bulletin, Philadelphia, Pennsylvania, January 24, 1973, p. 41. In those states, as in Pennsylvania, the death penalty statutes originally were mandatory, but were later amended to provide for imposition of a penalty of life imprisonment at the jury's discretion. The state courts held that this latter provision allowing for mercy had to fall under the *Furman* decision, leaving the mandatory death penalty provision in effect under state rules as to severability.

In the alternative, state courts must consider the broader issue of whether a particular state's law is in fact in violation of the *Furman* rationale, for the blanket upsetting of sentences without due consideration of that issue will further confuse the law and result in even wider discrepancies in sentencing. The notion of federal-state comity, the recognition of the fact that this country is made up of separate state governments administering different laws in different manners, requires that an individual state not have its laws stricken on the ground of unconstitutionality, where the decision relevant to determining such unconstitutionality is based on dissimilar and more inclusive laws from other states which were applied in factual contexts to which the law of the petitioning state would not have been applied. By analogy to this Court's holding in *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970), that "within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause," so the Commonwealth of Pennsylvania should be provided a forum in which to contest the constitutionality of its duly enacted statutes, so that this Court or the Pennsylvania Supreme Court can properly weigh the constitutionality of the death penalty in Pennsylvania. *Cf. Bartholomey v. State*, *supra* (dissenting opinion).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



RICHARD A. SPRAGUE
First Assistant District Attorney
ARLEN SPECTER
District Attorney

DEATH PENALTY SURVEY—1960 TO PRESENT

		FIRST DEGREE MURDER CONVICTIONS—430 CONVICTIONS		DEATH PENALTIES—34 DEFENDANTS	
		NUMBER OF DEFENDANTS	PERCENTAGE OF GROUP	NUMBER OF DEFENDANTS	PERCENTAGE OF GROUP
AGE	Under 15	4	1.14%	0	0
	16 to 24	194	55.26%	16	8.24%
	25 to 34	93	26.52%	7	7.53%
	35 to 44	38	10.82%	5	13.10%
	45 to 54	19	5.12%	1	5.26%
	Over 55	4	1.14%	0	0
RACE	BLACK	253	58.60%	19	7.47%
	WHITE	162	37.60%	14	8.63%
SEX	MALE	414	96.28%	32	7.73%
	FEMALE	16	3.72%	2	12.50%
COUNSEL	COURT	310	72.09%	26	8.38%
	PRIVATE	120	27.91%	8	6.66%
ADJUD.	JURY TRIAL	305	71.43%	24	7.86%
	GUILTY PLEA	122	28.57%	10	8.19%

APPENDIX B

Commonwealth *v.* Lopinson, Appellant.

Argued April 30, 1971. Before BELL, C. J., JONES, EAGEN, O'BRIEN, ROBERTS, POMEROY and BARBIERI, JJ.

Appeals, Nos. 140 and 141, Jan. T., 1966, from judgment of sentence of Court of Common Pleas, Oyer and Terminer of Philadelphia, July T., 1964, Nos. 469 and 470, in case of Commonwealth of Pennsylvania v. Jack Lopinson. Sentence of death vacated and appellant sentenced to life imprisonment; reargument refused November 14, 1972.

Proceedings upon remand for determination of possible violations of the *Witherspoon* principles (*Witherspoon v. Illinois*, 391 U.S. 510) in the selection of the jury. Before GRIFFITHS, J.

Report filed, by SLOANE, J., concluding that the procedure followed in selecting the jury which imposed the death penalty on defendant did not violate the *Witherspoon* precepts. Exceptions by defendant to report filed with Supreme Court.

OPINION PER CURIAM, October 4, 1972:

In 1965, following a jury trial in the Philadelphia Court of Common Pleas, the appellant was convicted of first-degree murder. The jury fixed the penalty at death. The conviction and sentence were affirmed by this Court, *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A. 2d 552 (1967). The United States Supreme Court vacated the judgment of sentence and remanded to this Court for reconsideration in light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). This Court, in turn, remanded the case to the court below for a determination of the *Witherspoon* issue. The court below found no violation of the standards enunciated in *Witherspoon* and filed a report to the Supreme Court of Pennsylvania to that effect. Appellant filed exceptions to the report.

Inasmuch as the United States Supreme Court, in *Furman v. Georgia*, 408 U.S. 238 (1972), has ruled that the imposition of the death penalty under statutes such as the

one in which the death penalty was imposed upon appellant* is violative of the Eighth and Fourteenth Amendments, it is unnecessary for us to consider appellant's claim of noncompliance with the *Witherspoon* standard. The Supreme Court, in *Moore v. Illinois*, 408 U.S. 786, 800 (1972), quoting from *Witherspoon*, stated: "Nor finally, does today's holding render invalid the *conviction*, as opposed to the sentence, in this or any other case. The sentence of death, however, may not now be imposed." *See Commonwealth v. Bradley*, 449 Pa. 19, — A.2d — (1972).

The sentence of death is vacated and appellant is sentenced to life imprisonment.

The former Mr. Chief Justice BELL and the former Mr. Justice BARBIERI took no part in the decision of this case.

*Act of June 24, 1939, P. L. 872, §701, *as amended*, 18 P.S. §4701.

APPENDIX C

Supreme Court of Pennsylvania
Eastern District

PATRICK N. BOLSINGER
PROTHONOTARY
GEORGE W. DUNN, JR.
DEPUTY PROTHONOTARY

Philadelphia, 19107
November 29, 1972

Richard A. Sprague, Esq.
First Assistant District Attorney
666 City Hall
Philadelphia, Pa. 19107

Re: Commonwealth of Pennsylvania v.
Jack Lopinson, Appellant
Nos. 140 and 141, January Term, 1966

Dear Mr. Sprague:

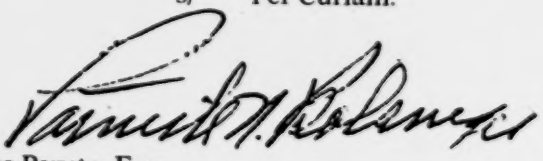
This is to advise that the following Order has been endorsed on the Petition for Reargument filed on behalf of the Appellee in the above captioned cases:

"11/14/72

Petition denied.

s/ Per Curiam."

PNB/s



cc: A. Charles Peruto, Esq.
202 N. Broad St.
Philadelphia, Pa. 19102

cc: Oscar Spivack, Esq.
1616 Two Penn Center Plaza
Philadelphia, Pa. 19102